

No. 06-1837

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dismissal without prejudice of his 42 U.S.C. § 1983 complaint. Under 28 U.S.C. § 1915(g), an inmate may not proceed IFP in a civil action or an appeal if he has on three or more previous occasions brought an action or appeal in federal court that was dismissed for frivolousness, maliciousness, or failure to state a claim, unless the inmate is under imminent danger of serious physical injury. Having conducted an independent review of the section 1983 cases that the district court counted as “strikes” under section 1915(g), we conclude that Mills had no strikes when he filed the instant lawsuit. See Andrews v. King, 398 F.3d 1113, 1118 (9th Cir. 2005) (reviewing de novo interpretation and application of § 1915(g)).

In two of the cases assessed as strikes, evidentiary hearings were held before the matters were finally dismissed, and in one of those cases, some defendants were granted summary judgment. The final dismissals in these cases do not constitute strikes. See Jennings v. Natrona County Detention Center Med. Facility, 175 F.3d 775, 778-81 (10th Cir. 1999) (discussing what constitutes strike under § 1915(g)). The third case counted as a strike was dismissed for failure to state a claim in April 2005, but the dismissal was not affirmed by this court until February 7, 2006, and the instant lawsuit was filed some months earlier, in November 2005.¹ See id. at 780 (counting dismissals as strikes only when appeals have been exhausted or waived).

Accordingly, Mills had no strikes when he filed the instant lawsuit. We now grant Mills IFP status in this appeal, and we reverse and remand for further proceedings consistent with this opinion.

¹This dismissal did not constitute a strike even when Mills filed the instant appeal, as the envelope in which his notice of appeal was sent is postmarked February 6, 2006.